

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS A. WARMUS,

Defendant-Appellee.

UNPUBLISHED
September 8, 1998

No. 201130
Oakland Circuit Court
LC No. 95-137002 FH

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Defendant, an officer or director of an insurance corporation, was charged with having a pecuniary interest in loans made by the insurance corporation in violation of the Michigan Insurance Code of 1956, MCL 500.5252; MSA 24.15252. The prosecution appeals as of right an order dismissing the charges on the basis of transactional immunity pursuant to MCL 500.246; MSA 24.1246.¹ We reverse and remand for further proceedings.

Defendant served as an officer or director of American Way Casualty Company of Michigan and American Way Life Insurance Company and is the sole shareholder in American Way Service Corporation, which owns the two insurance companies. He also had formed a limited partnership in Florida known as the Mid-Florida Yogurt-Warmus, Limited. The general partner in that venture was a corporation known as Mid-Florida Yogurt, Inc., and the limited partner was defendant. He was charged with transferring over \$2 million in assets of the insurance companies to a company known as Tidewater Management, Inc., a firm owned by one of defendant's general partners in Mid-Florida Yogurt-Warmus Limited, which then used the funds to acquire yogurt stores on behalf of Mid-Florida Yogurt-Warmus, Limited.

Defendant moved to dismiss the charges, arguing, among other things, that he enjoyed transactional immunity from prosecution pursuant to MCL 500.246; MSA 24.1246. He asserted that during 1988 and 1989, when the statute was in effect and his insurance companies were being investigated, he personally produced records pursuant to a court order that were being used against him in the prosecution on the charges brought pursuant to MCL 500.5252; MSA 24.15252. The trial court

denied the motion, finding that there was no evidence that defendant, as an individual, was ever ordered to produce documents or testify; but rather, the order was directed to the American Way entities and defendant could not claim whatever immunity the corporation was entitled to under the former statute. However, the court subsequently granted defendant's motion for reconsideration, which was accompanied by documents purportedly showing that he was individually ordered to produce documents and cooperate with the insurance investigation.

After an evidentiary hearing, the trial court found that defendant had been required to provide personal documents in an investigation by the Michigan Insurance Bureau. Furthermore, the court determined that although defendant had not refused to comply with the bureau's demands and had not advised the insurance commissioner that he was relying on his rights under MCL 500.246; MSA 24.1246, prosecution was barred by the statute. The court found that the statute did not require that a person first refuse to testify and then be ordered to do so to be afforded immunity under the statute. Because defendant was required to provide personal documents in the course of an investigation by the insurance bureau, the court found that pursuant to the plain language of the statute, he was entitled to immunity regardless of the fact that the insurance bureau is not a court, magistrate, arbitrator, or board of arbitrators.

On appeal, the prosecution argues that the trial court misconstrued MCL 500.246; MSA 24.1246. The prosecution contends that the immunity afforded by the statute is limited to testimony or records required by a court, magistrate, arbitrator, or board of arbitrators. Because there is no order of a court, magistrate, arbitrator, or board of arbitrators requiring defendant to testify or produce documents revealed by the record in this case, immunity was not triggered. Furthermore, because defendant never refused to produce any documents or assert a Fifth Amendment claim of privilege against self-incrimination, he would not be entitled to immunity even if there had been a court order. We agree and find that, correctly interpreted, the immunity statute precludes defendant's claim of transactional immunity.

Questions of law regarding statutory interpretation are reviewed de novo on appeal. *People v Bobek*, 217 Mich App 524, 528; 553 NW2d 18 (1996). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994); *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). The first criterion in determining intent is the specific language of the statute. *Id.* If the language is clear and unambiguous, judicial construction is not permitted. *Id.*

MCL 500.246; MSA 24.1246 (repealed by 1992 PA 182, § 2), provides:

No person shall be excused from attending and testifying, or producing any books, papers, or other documents before any court or magistrate, arbitrator or board of arbitrators, upon any investigation, proceeding or trial, for a violation of any of the provisions of this code, upon the ground or for the reason that the testimony or evidence documentary or otherwise, required of him may tend to incriminate or degrade him; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or

produce evidence, documentary or otherwise, and no testimony so given or produced shall be used against him upon any criminal investigation or proceeding.

In determining that defendant was immune from prosecution under the statute, the trial court read the phrase “before any court or magistrate, arbitrator or board of arbitrators, upon any investigation, proceeding or trial,” as “describing seven alternate circumstances under which testifying or producing documents will give rise to statutory immunity.” Because courts, magistrates, and arbitrators do not conduct investigations, reasoned the court, an interpretation that required the defendant to produce documents in response only to an order by a court, magistrate, or arbitrator in order to qualify for immunity would “render the words ‘upon any investigation’ nugatory.” However, the prosecution argues that the trial court’s interpretation, effectively adds the word “or” before the phrase “upon any investigation,” which changes the plain meaning of the statute. We agree with the prosecution.

According to the plain language of MCL 500.246; MSA 24.1246, only individuals required to produce “books, papers, or other documents” by *a court, magistrate, arbitrator, or board of arbitrators* are entitled to immunity. Because no conjunction occurs before the words “upon any investigation, proceeding or trial,” that phrase does not enumerate additional circumstances under which immunity would attach, but rather modifies the preceding clause so that individuals required to produce books, papers, or other documents before any court or magistrate, arbitrator, or board of arbitrators *in connection* with any investigation, proceeding or trial are eligible for immunity. Moreover, because the statute does not include within its scope orders issued by the insurance commissioner, we hold that the Legislature did not intend for immunity to attach when the commissioner of insurance orders production of documents.

Furthermore, an individual must assert a Fifth Amendment claim of immunity or invoke the statute’s immunity provision to trigger immunity. Immunity statutes are not self-executing, but rather a person must raise his constitutional privilege or object to answering any question tending to incriminate in order to trigger immunity. See *People v Parsons*, 142 Mich App 751, 760-762; 371 NW2d 440 (1985).

Although defendant did provide personal documents to the insurance bureau during the course of the investigation of his insurance companies, the documents were not provided pursuant to an order of a court, magistrate, or arbitrator. In addition, while defendant testified that he understood that he was obligated by law to cooperate with the insurance company investigation, he never asserted any privilege pursuant to MCL 500.246; MSA 24.1246 or the Fifth Amendment. Thus, the lower court erred in ruling that defendant was entitled to transactional immunity.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

¹ The statute has since been repealed by 1992 PA 182, § 2, which became effective on October 1, 1992.